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Interest Group Litigation and Canadian Democracy

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Editors' Note

Late last year the Supreme Court issued its controversial ruling in the *Marshall* case, upholding treaty fishing rights of East Coast Aboriginals. The decision triggered a heated dispute in the region. Skirmishes on the ground and debate in government chambers were followed by a clarification from the Court. The decision, the judges advised, had been misinterpreted and did not imply that the government could place no restrictions on native fishing.

The case is but one example of a phenomenon that is nowadays coming under increasing scrutiny: the pursuit of political, social and economic objectives by various groups through the courts. The common perception is that the recourse to litigation is especially prevalent among so-called Charter Canadian groups, who can appeal to rights explicitly granted them under the Canadian Charter of Rights and Freedoms to back their claims in court.

Views on this development differ. Some see it as a circumvention of democratic political channels that leads to the promotion of minority concerns at the expense of legitimate majority interests. Others see it as a normal part of politics in a democratic society, whereby courts step in to enforce duly recognized rights and provide definitive interpretations of ambiguous statutes.

In this paper, Gregory Hein of the University of Toronto tackles two central issues at stake in this debate. First: rhetoric and bombast aside, which groups actually litigate most frequently, and why? And secondly, what should Canadians make of the practice?

His paper answers the first question by providing a detailed empirical analysis of interest group activity in Canada's courts based on a review of all cases appearing in the Federal Court Reports and the Supreme Court Reports from 1988 to 1998. His is the most comprehensive study ever undertaken and as such is a valuable addition to our body of knowledge about interest group litigation.

The findings reveal that significant levels of litigation are generated by a wide variety of interest groups, especially by a cluster Hein dubs "judicial democrats" because they believe judicial review has the potential to enhance democracy. But others – corporate interests especially – regularly jump into the judicial fray too. At the same time, given that there are many fewer groups representing judicial democrats, the latter do show a greater tendency to enter the courtroom than others.

And what should we make of this penchant to litigate? Hein is skeptical of the view that pursuing interests through the courts represents a bypassing of the normal political process. Litigation, he contends, is a legitimate, indeed integral, part of politics for groups who see profound problems with our representative institutions and consider courts essential guarantors of minority interests and rights. His arguments and empirical evidence provide a forceful response to critics who contend that interest group litigation is a pernicious practice undermining the quality of Canadian democracy.

a n n o u n c e m e n t

Forthcoming *Choices* in the *Courts and Legislatures* series:

- **Joseph Fletcher (University of Toronto) and Paul Howe (IRPP), *Canadian Attitudes Toward the Charter and the Courts: Results of a Recent Survey in Comparative Perspective* and *Supreme Court Cases and Court Support: The State of Canadian Public Opinion*, which report results of a national survey commissioned by IRPP.**
- **Howard Leeson (University of Regina) *Section 33, the Notwithstanding Clause: A Paper Tiger?*, a review of the historical roots and current status of this little used constitutional rider.**

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Interest Group Litigation and Canadian Democracy

Interest Groups in Court

The Debate

Anyone who wants to understand judicial politics in Canada has to consider the efforts of organized interests. Groups are at the centre of most policy debates, trying to persuade an audience of elected officials, bureaucrats, editorialists and ordinary citizens to accept rival positions. The stakes are higher when they enter the courtroom. Organizations shoulder the burden of representing thousands of individuals, hundreds of unions scattered across the country, or entire industries. Some use impressive resources to mobilize the law, deploying teams of lawyers and expert witnesses. Advocates who want to reform society urge courts to make the bold decisions that infuriate critics of judicial activism. Instead of asking conventional legal questions, they often present novel arguments that stretch the boundaries of law.

Canadians can no longer ignore interest group litigation because it affects the style and substance of our political life. Though a specialized activity practiced by lawyers and discussed by legal scholars, it has become an important strategy for interests trying to shape public policy. Stories about court challenges are reported in the media every week and interest groups participate in most of the cases: civil libertarians guard free expression with vigilance, even if their efforts help men who produce and consume child pornography;[1] disabled people refuse to accept laws that ignore their needs;[2] feminists take on defence lawyers who attack Criminal Code measures designed to counter sexual assault;[3] pro-choice activists and pro-life groups return to court to argue about the presence or absence of fetal rights;[4] gays and lesbians pursue an ambitious campaign to stop discrimination based on sexual orientation;[5] First Nations assert Aboriginal treaty rights;[6] hunters enter the courtroom to oppose measures that restrict the use of guns;[7] groups that promote law and order denounce judges for paying too much attention to the rights of the criminally accused and too little attention to the victims of violent crimes.[8] Unions enter the judicial system to help workers[9] and corporations challenge regulations that frustrate their ability to maximize profits.[10] Their adversaries also litigate. Environmentalists and economic nationalists try to enforce laws that discipline the free market.[11]

Canadians who find these efforts unsettling identify several concerns. Organizations raise difficult moral, economic and political questions, but courts are not designed to sustain public discussions on complex issues. The most controversial claims pit courts against legislatures by asking judges to reject choices made by elected officials. Political life is pulled into our judicial system by groups that generate a steady stream of cases, but without confirmation hearings we know little about the men and women elevated to the Supreme Court. We know even less about superior court judges who also exercise broad powers. These fears are expressed by those who think that litigation can undermine the struggle for a better society and by those who insist that democracy is threatened by organizations that encourage judicial activism.

The debate in the 1980s was initiated by critical legal scholars and neo-Marxists who refused to believe that courts would be transformed into brash agencies of social change. Their assessment

was scathing.[12] The Charter cannot create a forum of principle elevated above the fray of politics, they argued, because courts are not immune from the public pressures, economic realities and ideological contests that affect legislatures. Citizens have new guarantees, but they are grandiose declarations that will not alter the allocation of power and the distribution of wealth. What did these sceptics predict? The barriers impeding access to legal remedies would not wither away. Working people would fail to win dramatic victories because too many judges are guided by values that favour corporate interests. Feminists so determined to win in court would soon discover grave dangers — their resources would be depleted and their adversaries would use the Constitution to attack the welfare state. After discovering the limits of litigation, activists trying to build a just society would see that Parliament is the real engine of reform.

The debate in the 1990s has been dominated by scholars and politicians on the right.[13] According to their account, activists on the left have been wildly successful because so many judges are "removed from reality."[14] These interests flood the courts because they cannot win the support of legislative majorities: most voters find their demands radical and dogmatic. We are told that gays and lesbians want to impose values that will undermine the traditional family. Aboriginal peoples are determined to establish title over huge tracts of land and secure access to lucrative resources just by presenting flimsy oral histories. Feminists promote an interpretation of equality that leads to "reverse discrimination." Civil libertarians, by guarding the rights of alleged criminals, make it more difficult for police and prosecutors to secure law and order. For critics on the right, these "special interests" belong to a coalition which could be called the "court party."[15] They bring the claims that fuel the growth of judicial power. Instead of trying to build public support for their ideas, these activists urge the Supreme Court to expand social services and benefits, alter the meaning of Aboriginal treaties written centuries ago, bolster regulatory regimes or repair legislative omissions. This use of litigation diminishes Canadian democracy, we are told, because it allows members of the court party to circumvent the legislative process.

This study offers an alternative argument by marshalling a large body of empirical data. The account advanced by conservative critics is incomplete and misleading. While warning us about "zealous" activists who invite judicial activism, they never tell us that courts are filled with a broad range of interests that express a wide array of values. Litigants talk to judges about child custody, labour disputes, income tax policy, advertising laws, medical procedures that cause harm, and the dangers of hazardous substances. This diversity exists because successive generations of Canadians have asked courts and governments to create new opportunities to participate in the judicial system and the legislative arena. We will see that critics on the right are correct when they argue that social activists are eager to pursue legal strategies. However, their interpretation ignores the economic interests that also appreciate the benefits of litigation. Corporations exert a surprising degree of pressure by asking judges to scrutinize the work of elected officials.

At the heart of this argument is an important analytical distinction designed to help us understand the strategic choices that groups make. The propensity to litigate is elevated by *stable characteristics*. Interests will be more inclined to mount court challenges when they have impressive legal resources, collective identities energized by rights, and normative visions that demand judicial activism. Strategic choices are also affected by *changing circumstances* that can make litigation seem attractive or even essential. Interests take advantage of interpretive opportunities, counter immediate threats that can be addressed by judges,

and move policy battles into the courtroom when their political resources have been eroded.

The evidence below suggests that Aboriginal peoples, Charter Canadians, civil libertarians, and new left activists have the greatest potential to influence public policy through litigation because they are pulled and pushed into the courtroom by both stable characteristics and changing circumstances. These interests can be called *judicial democrats* because a provocative idea is embedded in their legal arguments and political appeals — judicial review can enhance democracy. Finding deficiencies that weaken our system of government, they believe that the courts should listen to groups that lack political power, protect vulnerable minorities and guard fundamental values, from basic civil liberties forged by the common law tradition to ecological principles that have emerged in the past century.

This study also reveals that corporations do not have the stable characteristics that elevate the propensity to litigate. However, they do confront the changing circumstances that make legal action a compelling strategic manoeuvre. Businesses enter the courtroom to counter hostile actions, to block investigating government agencies and when their political resources have been depleted.

The Study

In vibrant liberal democracies, we find a dizzying array of interests that take different shapes: incorporated companies, unions with compulsory membership, unconventional organizations that belong to social movements, associations that represent entire industrial sectors, societies of professionals, and legal advocacy groups that have been designed to fight court battles. Theoretical perspectives devise classifications to order this universe of activity, often by emphasizing a single variable. We also find shifting boundaries in our discourse because political players define their aspirations and rename their opponents. After considering the academic literature and the current debate over judicial activism, nine categories were identified that are both coherent and salient. Examples appear in Table 1.

- Aboriginal peoples have a unique claim to land and resources as the first inhabitants of the continent now called North America. They are nations struggling to win recognition of land, treaty and self-government rights.
- Civil libertarians are determined to stop the state from undermining traditional guarantees that many individuals prize. Students, journalists, writers, church activists and defence lawyers challenge laws that violate freedom of expression, freedom of religion and rights that protect the criminally accused.
- Corporate interests are businesses that compete in a range of sectors: financial, retail, manufacturing, construction, pharmaceutical, agricultural, communications and natural resources. Their advocacy groups demand low levels of taxation, flexible regulatory regimes and trade liberalization.
- Labour interests are organized into unions and advocacy groups that represent miners, loggers, civil servants, teachers, nurses, police officers, auto-makers and technicians. Eager to improve the lives of workers, they defend the welfare state and oppose trade policies that produce unemployment.
- Professionals have the credentials to practice as lawyers, judges, accountants, academics, pharmacists, doctors, architects and engineers. Most work in the private sector as entrepreneurs, but some are employed by large public institutions. They pursue collective action to promote their interests and to protect the integrity of their respective professions.

Table 1
Categories of Organized Interests

Aboriginal Peoples	Assembly of First Nations Assembly of Manitoba Chiefs Congress of Aboriginal Peoples Dene Nation Native Council of Canada Union of New Brunswick Indians
Civil Libertarians	Amnesty International Canadian Civil Liberties Association Canadian Council of Churches Canadian Federation of Students Centre for Investigative Journalism Criminal Lawyers' Association
Corporate Interests	Canadian Bankers' Association Canadian Manufacturers' Association Canadian Telecommunications Alliance Merck Frosst Canada Thomson Newspapers R.J.R. MacDonald
Labour Interests	Canadian Labour Congress International Longshoremen's and Warehousemen's Union National Federation of Nurses' Unions Public Service Alliance of Canada Union des employés de service United Fishermen and Allied Workers' Union
Professionals	Association provinciale des assureurs-vie du Québec Association québécoise des pharmaciens propriétaires Canadian Association of University Teachers Canadian Bar Association Canadian Institute of Chartered Accountants Canadian Medical Association
Social Conservatives	Alliance for Life Evangelical Fellowship of Canada Human Life International Inter-Faith Coalition on Marriage and the Family National Firearms Association REAL Women
Victims	Canadian Cancer Society Canadian Council on Smoking and Health Canadian HIV/AIDS Legal Network Canadian Resource Centre for Victims of Crime Central Ontario Hemophilia Society Westray Families
Charter Canadians	Canadian Council of Refugees Canadian Disability Rights Council Canadian Jewish Congress Fédération des francophones hors Québec Native Women's Association of Canada Women's Legal Education and Action Fund
New Left Activists	Canadian Peace Alliance Council of Canadians Equality for Gays and Lesbians Everywhere National Anti-Poverty Association Sierra Legal Defence Fund Société pour vaincre la pollution

- Social conservatives want to preserve traditional values sustained for centuries by church and family. They oppose open access to abortion services, homosexuals who demand "special rights," gun regulations that punish citizens without reducing crime, feminists who want to marginalize fathers, and a popular culture that encourages promiscuity.
- Groups that represent victims want to help individuals hurt by cancer, AIDS, drug addiction, smoking, intoxicated drivers, violent crimes, mining tragedies, silicone breast implants, the transmission of infected blood and sexual abuse in schools.
- Charter Canadians believe that state intervention is required to solve pressing social problems.[16] They derive inspiration and impressive legal resources from the 1982 Constitution. Groups representing ethnic, religious and linguistic minorities, women and the disabled can base their claims on guarantees designed to protect their interests.
- New left activists also believe that state intervention is needed to address grave social problems, but they do not enjoy constitutional rights that were explicitly designed to protect their interests. Environmentalists, gays and lesbians, anti-poverty advocates and economic nationalists can invoke the Charter to stop military tests, fight discrimination, preserve wild spaces and stop governments from dismantling the welfare state, but they have to hope that judges will use their discretion to extend the scope of existing guarantees.

To understand the legal strategies that these groups pursue, every decision appearing in the Federal Court Reports (1,259) and the Supreme Court Reports (1,329) from 1988 to 1998 was reviewed.[17] My Court Challenges Database records relevant facts about each case, including the legal status of litigants.[18] Organizations appear as *parties* when they have a direct stake in a case. If groups are allowed to participate as *intervenors*, they can present oral arguments and written submissions to address issues raised in a dispute. To understand the purpose of litigation, six possible targets were identified.

- Groups can achieve their objectives by confronting *private parties*. They counter individuals, unions, professional associations and corporations.
- Litigants also take aim at *bureaucratic officials* who exercise limited statutory powers. Some work for line departments, but most have positions on boards, tribunals, commissions and inquiries.
- Organizations can bring claims against *cabinet ministers* to block unfavourable decisions or to make governments act. By seeking writs of mandamus, they can ask courts to enforce mandatory duties.
- The stakes are higher when groups mobilize the law to overturn the *statutes and regulations* that are introduced by governments.
- To improve their chances of winning future contests, litigants can try to shape *judicial interpretations*. The primary goal of this strategy is to direct judges when they define the meaning, purpose and scope of common law rules, ordinary statutes and constitutional guarantees.
- Groups also enter the courtroom to defend favourable policies when their adversaries launch *hostile actions*.

Some cases were excluded from the analysis. Challenges against Crown corporations, universities and hospitals were removed because they are relatively independent agencies that rarely exercise coercive authority. Minor actions against cabinet ministers were also taken out. For example, businesses fight tax assessments or sue departments for breach of contract without addressing larger issues.

Several limitations should be noted. Because most intervenors appear before the Supreme Court, groups that favour this form of participation might be overrepresented. Interests that mobilize federal administrative law might also be overrepresented because the Federal Court has exclusive jurisdiction. We cannot look for regional variations that might exist because provincial superior courts are not examined. For the same reason, it will be impossible to compare patterns in English Canada and Quebec.

Interest Group Litigation Before the Charter

Courts played an important role before the Charter was entrenched by protecting property, hearing administrative actions, enforcing the criminal law and resolving disputes between both levels of government. Certain interests appreciated the potential value of litigation. Businesses filled the judicial system to advance pecuniary and proprietary claims. They also attempted to influence public policy. This became very apparent during the 1930s, when corporations invoked the division of powers to obstruct the growth of the welfare state.[19] They succeeded when the Judicial Committee of the Privy Council promoted provincial autonomy and economic liberties by invalidating federal laws.[20]

Courts were also asked to defend civil liberties, even in the nineteenth century. Most cases were initiated by individuals facing charges or governments fighting jurisdictional battles, but organizations supported some challenges at a distance.[21] Francophones and Roman Catholics in Manitoba asserted constitutional rights that guarantee the use of French in public institutions and funding for denominational schools.[22] After winning the right to vote, suffragettes turned their attention to a provision in the Constitution that was interpreted to exclude women from the Senate. In a case that is still celebrated by feminists, they persuaded the Judicial Committee of the Privy Council that the term "qualified persons" encompassed both sexes.[23] This campaign was backed by the National Council of Women and a number of smaller groups. In the 1950s, prominent members of the legal community began helping religious minorities and communists who were deemed to be "subversives."[24] By the 1970s, feminists were hoping that courts would use the Canadian Bill of Rights to eliminate discrimination. At the same time, environmentalists were exploring various claims to punish corporations and governments for failing to respect new pollution laws.

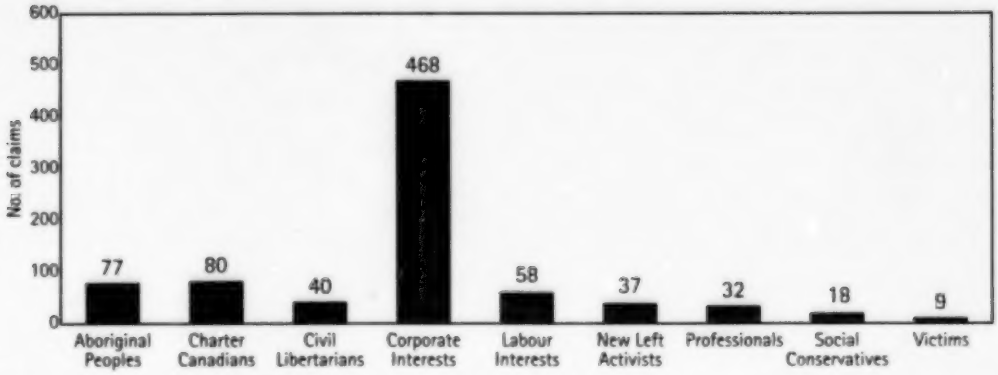
These efforts were exceptional. For more than a century, few organizations entered the courtroom to affect public policy. It was possible to have a complete understanding of Canadian politics without ever thinking about interest group litigation. The labour movement concentrated on the party system because courts did little to help workers; relying on the assumptions of classical liberalism, judges allowed market forces to settle most issues.[25] Activists who wanted to solve social problems pressured legislators and devised novel strategies in order to change public attitudes, but few imagined that litigation could be turned into an instrument of reform.[26] While achieving some of their objectives in court, corporations lobbied cabinet ministers and senior officials because they appreciated the importance of elite accommodation and the power of bureaucracies.[27]

Interest Group Litigation After the Charter

This study reveals that a transformation has occurred. Interest group litigation is now an established form of collective action. Organizations present 819 claims between 1988 and 1998. They appear as parties or intervenors in 30 percent of the disputes considered by the Federal Court and the Supreme Court.[28] Figure 1 records the frequency of participation.

Groups from every category pursue legal strategies. This single finding is remarkable — we now find the same mix of political players trying to

Figure 1
Organized Interests in Court, 1988–1998



Source: Court Challenges Database.

influence courts and governments. But if there has been an important change, we also find elements of continuity. Court dockets are still laden with corporations. They bring 468 legal actions, far more than the other interests. Companies engage in civil litigation against private parties, and challenge regulations governing banking, federal elections, international trade, environmental protection and the pharmaceutical industry. Groups representing professionals participate in 32 cases. They try to win higher salaries as employees and as experts they talk to judges about a range of issues, including the principles that guide child custody disputes and criminal investigations. Very few of their challenges try to alter major public policies. The unions and advocacy groups that represent labour interests bring 58 claims. They back members alleging gender discrimination, fight for higher salaries, counter measures that undermine collective bargaining, try to escape criminal contempt charges and assert the right to strike.

The big change is that courts now hear from interests that struggled for decades to win access. For more than a century, courts and governments in Canada maintained barriers that discouraged or even prevented litigation. The Indian Act was amended in 1927 to stop Aboriginal peoples from bringing legal claims. Although this restriction was lifted in 1951, the Supreme Court did not begin to recognize and protect Aboriginal rights until 1973, when it considered a case brought by the Nisga'a.[29] Steep obstacles were preserved by the common law. Rules on standing, proof, evidence, and costs reflected a clear preference. Judges wanted to sift through intrinsic evidence to settle discrete legal questions raised by two parties engaged in a live controversy. Applicants who could demonstrate a direct stake in a dispute were allowed to exercise their private rights. Citizens who organized to address public problems were usually sent away.[30]

Some interests were also hampered by weak legal resources. Environmentalists discovered that few regulatory laws established the causes of action and the precise mandatory duties that make litigation more effective. Governments resisted these measures because they believed that legal campaigns would diminish their autonomy and disrupt political life. Groups could base their claims on the Canadian Bill of Rights after 1960. A minor provision in the Indian Act was found to be inconsistent with the guarantee of equality a decade later.[31] This ruling encouraged feminists and civil libertarians who were eager to help vic-

tims of discrimination, but it turned out to be an aberration. Subsequent decisions returned to a narrow interpretation of equality.[12] Litigants also confronted a wall of judicial deference. In the end, most members of the Supreme Court refused to believe that the doctrine of legislative supremacy could be constrained by an ordinary federal statute that lacked constitutional status.

Figure 1 reveals that litigation is now an important strategy for groups that once confronted these obstacles:

- Aboriginal peoples launch 77 claims between 1988-98. First Nations take on the federal government when it fails to act in their best interests; they secure title to land by asserting Aboriginal rights and challenge laws that fail to respect treaty rights.
- Charter Canadians are just as active: 80 legal arguments are presented to oppose measures restricting abortion services, to chastise provincial governments for breaching language rights, to reveal racism in the criminal justice system, and to overturn election laws that discriminate against the mentally ill.
- Civil libertarians participate in 40 cases that attack policies impairing democratic rights, fundamental freedoms and guarantees that protect the criminally accused.
- New left activists bring 37 claims. They enter the courtroom in order to protect delicate ecosystems, help poor people facing arrest, overturn policies that exclude homosexuals, and counter measures that limit demonstrations.
- Social conservatives bring fewer claims, only 18. The most controversial claims try to persuade courts to recognize fetal rights. Unlike their American allies and their Canadian adversaries, social conservatives have not formed any legal advocacy groups; these are specialized organizations designed to fight legal campaigns.[13] In the early 1990s, the Canadian Rights Coalition was established to take on doctors who dared to perform abortions, but it soon disappeared.
- Organizations that represent victims bring even fewer court challenges, only nine. They usually participate outside the courtroom. Most legal claims are brought by individuals who allege negligence or breach of trust to win compensation. Class actions are also orchestrated to counter threats that harm hundreds of victims.[14]

We find this diverse range of interests pursuing litigation because governments and courts have created new opportunities to participate. The Charter was entrenched by federal politicians who wanted to strengthen the national community and weaken regional identities.[15] Though guided by this strategic calculation, they also sensed that a shift was occurring. A growing number of citizens were willing to accept or even embrace the idea of constitutional guarantees because their attitudes and expectations had been affected by the international rights movement and the work of the United Nations and by social movements in Canada and the United States that were mobilizing to promote free expression, equality, and reproductive rights. Since the patriation round in 1982, governments have introduced funding programs and statutory rights to make administrative regimes, the regulatory process and the judicial system more accessible.

The Supreme Court has also introduced changes that have encouraged interest group litigation. The law of standing has been liberalized in stages.[16] The old common law rule favoured property owners and corporations trying to protect private rights and filtered out citizens who wanted to address public problems. Under the new rule, applicants who ask a serious legal question and demonstrate a "genuine inte-

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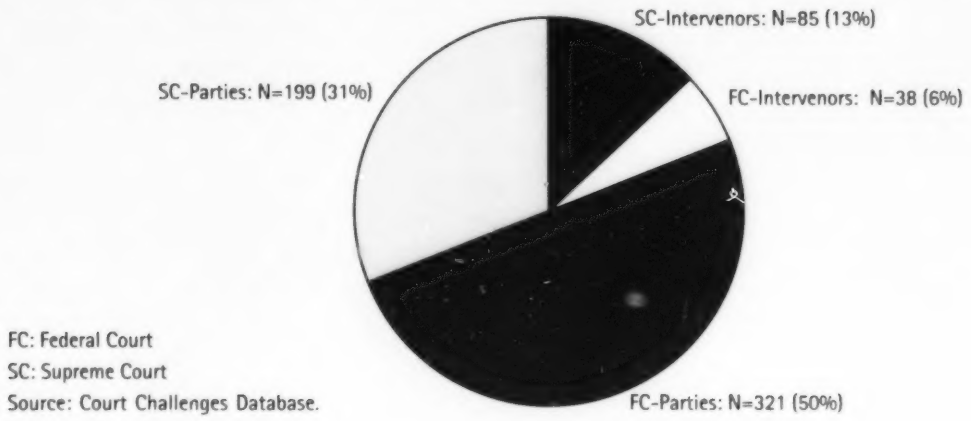
Figure 2
The Legal Status of Interests Seeking Private Benefits



FC: Federal Court
SC: Supreme Court
Source: Court Challenges Database.

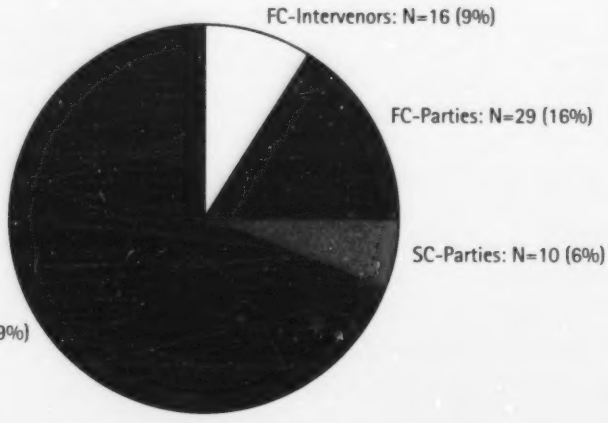
rest" can win access if certain conditions are satisfied. The Supreme Court has also relaxed the requirements for intervening. Groups with a record of advocacy displaying expertise in a particular area usually receive permission to appear as friends of the court.[17]

The Legal Status of Participants

Looking at evidence from the Court Challenges Database, we can find out how organizations participate. A clear pattern emerges. Corporations, professionals, unions, Aboriginal peoples, and victims usually participate as parties because they tend to seek "private" benefits for partners, shareholders, or members. Figure 2 reveals that litigants with this legal status present 81 percent of their claims. Standing is not a barrier because it is easy to demonstrate a direct stake in a dispute. These interests do intervene when they are represented by advocacy groups that want to influence public policy.

We find the very opposite in Figure 3. Charter Canadians, civil libertarians, new left activists, and social conservatives usually participate as intervenors because they tend to seek "public" benefits. Litigants with this legal status present 78 percent of their claims. Most appear before the Supreme Court. Groups that take this route have to accept several constraints. Intervenors cannot file motions, submit evidence, call witnesses, cross-examine or appeal decisions. These limitations do not discourage public interests because they appreciate the advantages of this form of intervention. Not confined to a specific set of facts, intervenors are free to develop bold claims that dissect complicated social problems. Instead of wasting time and money participating as parties, intervenors can be selective. They can monitor thousands of cases moving up the levels of our judicial system. By appearing before the Supreme Court, interests seeking diffuse public benefits can build precedents, shape public policy and counter hostile actions — without exhausting their resources.

Figure 3
The Legal Status of Interests Seeking Public Benefits



FC: Federal Court
SC: Supreme Court
Source: Court Challenges Database.

Legal Action as a Political Strategy

Interest Group Litigation and State Intervention

The central purpose of litigation is to influence the state. There are three variations. Groups from every category choose litigation to *direct state intervention*. They challenge bureaucracies, boards, tribunals, commissions and inquiries that make decisions about such areas as telecommunications, energy policy, workplace discrimination, labour relations, international trade, transportation rates and agricultural marketing. Interests also try to prod governments that ignore mandatory duties and constitutional obligations. For example, businesses demand that federal officials enforce tariffs and rules protecting copyright.[38]

Litigants also try to *bolster state intervention*. Charter Canadians pursue this strategy more than other interests. Groups asserting minority language education rights make governments create new institutional arrangements that courts have to supervise.[39] Advocates who represent the disabled try to expand health-care services.[40] Feminists determined to eliminate "systemic discrimination" invite judges to re-write social policy by extending unemployment benefits and to alter the distribution of wealth by amending income tax provisions.[41] New left activists also rely on this strategy. Environmentalists try to improve regulatory laws by asking courts to offer a broad interpretation of the duties that bind the Crown.[42] Gays and lesbians choose litigation to win benefits and fill in legislative omissions.[43]

Some litigants do the opposite. They try to *block state intervention*. First Nations resist the application of laws that inhibit practices central to their culture and commercial activities that promote economic autonomy.[44] Civil libertarians invoke traditional guarantees that constrain the exercise of state authority. To promote the free exchange of ideas, they challenge provisions that limit forms of expression labelled hate speech, pornography and libel.[45] Social conservatives object to laws that erode traditional values. Some argue that gun-control restrictions are intrusive and ineffective. Others are determined to stop governments from granting homosexuals the rights and benefits that

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heterosexuals now enjoy. The relationship between professionals and the state is mediated by bodies that set standards for admission and enforce rules of conduct. Members who feel too constrained challenge measures that restrict their entrepreneurial activities.[46] Corporations are affected by the constraints and costs of state intervention more than other interests. They mobilize the Constitution to attack environmental regulations that produce "inefficiencies," bans that limit advertising and marketing regimes that control interprovincial trade.[47]

Confronting Private Parties and Bureaucratic Officials

The debate over judicial activism gives us a distorted picture of interest group litigation because it focuses on the contentious cases that pit courts against legislatures. This study reveals that organizations achieve some of their objectives without asking judges to review the work of elected officials. Half of the actions initiated by corporations are civil claims against private parties. They are driven by one of the great engines of capitalism — the desire to accumulate profits. Businesses enter the courtroom to stop trademark, copyright and patent infringement. They also seek damages for negligence and breach of contract. It is important to acknowledge this body of litigation to understand why companies enter the courtroom, but these cases rarely affect public policy.

Groups from every category target bureaucratic officials exercising statutory powers. Some of these claims are ignored because they lack the drama of constitutional challenges. However, organized interests know that bureaucracies, boards, tribunals, commissions and inquiries make thousands of decisions that implicate major public policies. Aboriginal peoples and new left activists take on federal administrators responsible for environmental assessments. Charter Canadians confront the adjudicators who hear immigration claims. Social conservatives attack human rights tribunals for extending too much protection to homosexuals. Groups that represent victims defend inquiries investigating negligent practices. Labour litigants pursue this strategy more than other interests. According to the Court Challenges Database, 38 percent of their campaigns are directed at bureaucratic officials who consider such issues as the certification of bargaining units, the role of conciliation boards, transportation rates, the re-classification of workers, telecommunications policy and gender discrimination.[48]

Shaping the Interpretive Process

Courts define the meaning, purpose and scope of common law rules, ordinary statutes and constitutional guarantees. Organizations aware of this central fact know that precedents are building blocks. Over time they can persuade judges to jettison old standards, reject threatening arguments advanced by adversaries and improve their chances of winning future contests. For instance, corporate interests try to influence the interpretation of laws that govern the banking industry.[49] To help poor people, new left activists insist that governments have a constitutional obligation to provide legal aid.[50] Professionals eager to offer their expertise talk to judges about child custody provisions in the Divorce Act, the requirements for establishing title to land and the principles that discipline criminal investigations.[51] Social conservatives ask courts to protect the fetus by redefining negligence.[52]

Charter Canadians and civil libertarians pursue this strategy more than other interests. A full quarter of their claims target judicial interpretations. Feminists try to influence the defence of consent, the law of limitations and the rules governing disclosure in sexual assault proceedings.[53] Ethnic minorities enter the courtroom to talk about racism in the criminal justice system.[54] Civil libertarians intervene when journalists are

denied access to evidence, when broadcasters are compelled to surrender video footage, when judges contemplate publication bans, and when libel claims discourage free debate.[55] Organizations representing criminal defence lawyers try to affect search and seizure procedures and the requirements for proving aggravated assault.[56] This strategy can be very effective, but success creates a burden because interests have to fight an endless number of battles to secure and maintain an advantage.

Challenging Elected Officials

Claims that challenge elected officials are more captivating because the stakes are higher. When litigants target Cabinet decisions and public policies they ask appointed judges to reject choices made by politicians who have won the support of citizens in general elections. The consequences can be unsettling, even for Canadians who admire the Charter and recognize the legitimacy of judicial review. Decisions can rearrange legislative agendas that reflect public concerns, strain regulatory regimes already burdened by onerous responsibilities, alter spending priorities when governments are striving to trim deficits and spark violent reactions that divide communities. The evidence presented in Table 2 cuts to the very heart of the debate over judicial activism. It demonstrates which interests exert pressure on the federal state by challenging laws and political executives.

Professionals oppose mandatory retirement, social conservatives attack laws that fail to protect the fetus, and unions question measures that restrict collective bargaining and the right to strike, but these are the exceptions.[57] They bring only 10 percent of the claims that target elected officials and most cases try to knock down minor provisions. Groups supporting victims never pursue this strategy.

Far more pressure is generated by the interests that worry critics on the right. Aboriginal peoples, Charter Canadians, civil libertarians and new left activists bring 52 percent of the claims that attack Cabinet decisions and public policies. To win, these litigants have to persuade judges to accept a controversial role — to be full partners in the legislative process who use their skills to solve pressing problems and exercise their authority to improve society. Aboriginal peoples and new left activists question laws passed by both levels of government, but they often target cabinet ministers. First Nations, alleging a breach of trust, demand the enforcement of a broad fiduciary duty that requires the federal government to act in their best interests.[58] Invoking Aboriginal rights, they hope to establish title to huge tracts of land worth billions of dollars and try to expand existing treaties to secure better access to natural resources.[59] Environmentalists try to stop massive projects that are championed by provinces hungry for new sources of revenue.[60] Cabinet ministers responsible for telecommunications and social assistance are confronted by anti-poverty activists.[61]

Charter Canadians and civil libertarians also pursue this strategy, but they tend to target statutes and regulations. Feminists try to remove measures restricting access to abortion services.[62] Religious minorities oppose immigration procedures that violate the right to counsel and military policies that discriminate against Jewish officers.[63] Groups representing the disabled try to knock down Criminal Code provisions that discriminate against the mentally ill.[64] Civil libertarians ask courts to scrutinize reapportionment plans, rules that deny prisoners the right to vote, and laws that bar the publication of opinion polls.[65] To help the criminally accused, they ask courts to overturn provisions that undermine the right to be presumed innocent and the right to bail.[66]

These interests do not belong to a unified coalition. Charter Canadians complain that civil libertarians ignore the dangers of pornography and hate speech. Feminists denounce First

Table 2
Targeting Elected Officials, 1988–1998

Organized Interests	Cabinet Ministers		Statutes and Regulations		Total	
	No. of claims	(%)	No. of claims	(%)	No. of claims	(%)
Corporate Interests	48	42	45	34	93	38
Aboriginal Peoples	33	29	18	14	51	21
Charter Canadians	10	9	19	14	29	12
New Left Activists	15	13	9	7	24	10
Civil Libertarians	2	2	20	15	22	9
Labour Interests	3	3	9	7	12	5
Social Conservatives	1	1	6	5	7	3
Professionals	1	1	5	4	6	2
Victims	0	0	0	0	0	0
Totals	113	100	131	100	244	100

Source: Court Challenges Database.

Nations for failing to recognize the distinct rights of Aboriginal women and environmentalists express frustration when Aboriginal bands challenge laws that regulate the development of natural resources. Still, common concerns often bridge these divisions. Outside the courtroom, activists linked by a national network orchestrate campaigns to oppose privatization, trade liberalization, deregulation and the devolution of responsibilities to the provinces. During constitutional negotiations, they rally against proposals that would jeopardize existing guarantees and the federal spending power.

These interests also work together in court. Charter Canadians and civil libertarians intervene when criminal defendants encounter racism.[67] Feminists who ask courts to rewrite federal tax laws and disabled activists who demand the extension of health-care services receive support from groups that try to help poor people.[68] Charter Canadians eager to fight discrimination enter the courtroom with gays and lesbians to attack laws that favour heterosexuals and exclude homosexuals.[69] Environmentalists form alliances with Aboriginal peoples and economic nationalists to protect delicate ecosystems and defend regulatory regimes that discipline the free market.[70]

The big surprise is that corporate interests are so active in targeting elected officials. Table 2 reveals that they present 38 percent of the claims that challenge laws and Cabinet decisions. Requesting writs of mandamus, businesses try to enforce rules governing international trade. Invoking the federal division of powers, they attack laws that address competition, new drugs, environmental protection and tax policy.[71] The Charter is also mobilized by corporate litigants. Companies insist that marketing regimes controlling interprovincial trade violate mobility rights and the guarantee of equality.[72] Media corporations challenge laws that restrict their ability to collect and disseminate information.[73] The owners of Thomson Newspapers, for example, won a dramatic victory in 1998, when they persuaded the Supreme Court to nullify a measure that barred the publication of opinion polls at the end

Table 3
Propensity to Litigate

Organized Interests	Population	No. of claims	Ratio
Corporations	180,000	468	1:385
Aboriginal Peoples, Charter Canadians Civil Libertarians, New Left Activists	1,600	234	1:7

Source: Court Challenges Database.

of election campaigns.[74] Some of the most controversial cases seek to protect commercial expression by knocking down social policies. Corporations, for instance, have challenged provisions that prevent advertising aimed at children and the advertising of tobacco products and liquor.[75]

Propensity to Litigate

This study demonstrates that hundreds of businesses enter the judicial system to advance their interests and that a significant proportion ask courts to confront governments. However, the evidence does not suggest that corporations have a strong propensity to litigate. To understand strategic preferences, we have to consider the entire universe of associations — those that choose legal action and those that stay outside the judicial system. An elementary fact about the nature of capitalist societies has to be acknowledged. Most organizations are businesses, even in countries that have strong labour unions and thriving social movements. A ratio indicating litigation propensity can be formulated if we estimate the number of associations and the number of court challenges they mount.

What do we find? On the one hand, there are at least 180,000 businesses generating more than 500,000 dollars in revenue annually.[76] They bring 468 claims. On the other hand, Aboriginal peoples, Charter Canadians, civil libertarians and new left activists are represented by only 1,600 organizations.[77] They participate in 234 cases. This comparison suggests that corporations do not display a propensity to litigate. Table 3 confirms what many already suspect. The interests that conservative critics blame for the expansion of judicial power are far more inclined to litigate than other groups.

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Understanding Interest Group Litigation

Developing an Explanation

The real task for Canadians who want to understand interest group litigation is to figure out why most of the controversial claims are brought by organizations that share few similarities. A good explanation has to tell us why the judicial system attracts interests that are almost diametrically opposed — reformers who want to expand the scope of state intervention and big corporations determined to knock down laws that frustrate free enterprise.

This study emphasizes a crucial distinction. The propensity to litigate is elevated by three *stable characteristics*: impressive legal resources, identities bolstered by rights, and normative visions that demand judicial activism. Groups

that do not display these stable characteristics still end up in court, however, because three *changing circumstances* can make legal action seem attractive or even essential. Organizations not inclined to litigate can take advantage of interpretive opportunities, counter immediate threats, and move policy battles into the courtroom when their political resources wane. Using this distinction, we can find out why groups participate sporadically or frequently. It also reveals which interests have the greatest potential to influence public policy through litigation — those affected by both the stable characteristics and changing circumstances that pull and push organizations into the judicial system.

Stable Characteristics

Legal Resources. One stable characteristic that affects the propensity to litigate is the possession of legal resources. Such resources are not distributed evenly. Instead, governments have encouraged certain interests to litigate by dispensing new legal resources selectively. We know that courts have made our judicial system more accessible by lowering some of the old common law barriers; the law of standing has been liberalized and the requirements for intervening have been relaxed. Courts have also affected the distribution of legal resources by defining the purpose and scope of statutory rights and constitutional guarantees. This fascinating political process has produced winners and losers.

Groups that have limited legal resources bring a small proportion of the cases that take on cabinet decisions and public policies. Consider these examples. Labour unions can initiate constitutional challenges, but the argument with the greatest potential to help workers has not been accepted by the Supreme Court.[78] In a trilogy of cases, it decided that freedom of association does not create the right to bargain collectively or the right to strike.[79] The Supreme Court has also discouraged opponents of abortion by refusing to declare that section 7 gives a fetus the right to life.[80]

Some of the interests that display a propensity to litigate secured impressive legal resources during the patriation round in 1982. Charter Canadians can base their claims on guarantees that were designed to protect their interests. Most are "named" in section 15, the equality provision that prohibits discrimination based on race, national origin, colour, religion, sex, age, and disability. Women and ethnic minorities can also invoke declarations that are supposed to guide the interpretive process; section 27 acknowledges the value of multiculturalism and section 28 reinforces the importance of gender equality. The 1982 constitution also helps minority language groups.[81] The Charter guarantees the use of French and English in public institutions in Canada and New Brunswick and minority language education in every jurisdiction. Civil libertarians have impressive legal resources because the Charter entrenches guarantees that have been recognized and respected by common law courts for centuries. They can talk to judges about a range of issues by asserting fundamental freedoms, democratic rights, and rights that protect the criminally accused.

Some of the interests that display a propensity to litigate have improved their legal resources in court. Gays and lesbians have achieved dramatic victories invoking the guarantee of equality because the Supreme Court was willing to extend the scope of section 15 by adding sexual orientation to the list of prohibited grounds.[82] The Supreme Court has developed the legal resources Aboriginal peoples now employ. They can protect activities, customs, and practices integral to their culture by asserting inherent rights and establish title to their ancestral lands by presenting oral histories.[83] First Nations can also challenge provincial laws that undermine their treaty rights and invoke a broad fiduciary duty that requires the federal government to act in their best interests.[84]

Businesses do not display a propensity to litigate because they lack the impressive constitu-

tional weapons that some interests enjoy, but they participate more than labour unions, professionals, and social conservatives because they do have solid legal resources. On the one hand, the Charter does not entrench property rights, arguments that use section 7 to defend economic liberties have been rejected, and a number of rights protect individuals not corporate entities. On the other hand, business interests can advance claims that assert freedom of expression, mobility rights in section 6, and some of the legal rights, including the guarantee against unreasonable search and seizure and the guarantee of a fair trial without unreasonable delay.[85] Corporations can also devise a wide array of arguments when they are scrutinized by the state. The Supreme Court has decided that any Charter provision can be invoked as a defence, in criminal proceedings and in civil proceedings against public agencies that exercise coercive powers.[86]

We cannot understand why groups litigate just by looking at the distribution of legal resources. New left activists display a propensity to litigate, but anti-poverty advocates, environmentalists, and economic nationalists have weak constitutional resources. They cannot invoke Charter guarantees that have been designed to protect their interests. They can try to persuade courts to alter the scope and purpose of existing provisions, but most of their arguments have been rejected.[87] These new left activists have to be creative and tenacious to win — they have to devise innovative claims with very little. To appreciate why they persist in their efforts, we must consider other interest group characteristics conducive to litigation.

Identities Energized by Rights. Rival political actors construct collective identities to affect the way we see the world. They are animated by ideas, problems and tasks that give meaning, purpose, and a sense of belonging. Union leaders, for example, hope to inspire their members by talking about the virtues of solidarity and the need for fairness in the workplace. Some environmentalists place the notion of preserving at the centre of their collective identity. They tell us about species and experiences that have been lost forever because of our failure to protect the "gifts of nature." Saving is an idea that inspires pro-life groups. Their goal is not simply to oppose a public policy or a medical procedure. It is far more profound. They are determined to rescue endangered lives.

Rights have attractive qualities for interests trying to build collective identities, especially if they are determined to transform society. Because rights have a certain majesty they can turn ordinary political demands into principles that have to be respected. Because rights have been invoked to counter great evils, from racial segregation in the United States to genocide in Europe, they are emotionally charged. Rights also provide a source of unity; they seem to have a magnetic pull that can draw individuals together. Outside the courtroom, the language of rights can be used creatively and forcefully to rally supporters, frame arguments, and criticize threatening policies.

These attributes suggest that rights are more than mere utilitarian instruments that can be invoked to win legal remedies. However, interests that have identities sustained by rights are determined to explore the possibilities of litigation. The courtroom is an institutional site that offers litigants the opportunity to present claims based on rights. It is also a stage that gives the players a chance to publicize their concerns and promote their values. They can win credibility and legitimacy by convincing judges to accept their principled arguments. Litigation is also attractive because courts exercise authority; their decrees can direct other state institutions. Social activists who feel ignored by political elites can oppose unfavourable policies and Aboriginal peoples can force governments to respect the terms of treaties.

In Canada, the interests that display a propensity to litigate do have collective identities sus-

tained by rights. Civil libertarians harness this novel source of energy to protect individuals from the state. Named for their enterprise, they mobilize the law to guard basic civil liberties. Aboriginal peoples, Charter Canadians, and new left activists crave the power that rights can generate even more because they want to transform major social, economic, and political institutions. To achieve their ambitious goals, these interests "deconstruct" cultural conventions, undermine deeply rooted attitudes, and build alternative systems of meaning. Gays and lesbians want to redefine our understanding of marriage and family. Environmentalists conduct their own science and apply standards of proof that shift the onus from citizens concerned about the effects of toxic substances to corporations producing an endless flow of chemicals. Feminists confront bureaucrats who claim to be objective and devise interpretations of history that rival official accounts. Aboriginal peoples defend cultures that challenge western notions of property, community, and sovereignty.

The rights that energize collective identities in Canada have distinguishing features; their nature, history, and status vary. The rights that civil libertarians celebrate have a prestigious lineage. Fundamental freedoms and guarantees that protect the criminally accused have been recognized for centuries by judges following the common law tradition. Aboriginal peoples struggling to achieve self-determination and self-government assert inherent rights that can be acknowledged or rejected by courts. Rights are at the centre of the collective identities that bind Charter Canadians. They derive meaning, purpose, and influence from entrenched guarantees that were intentionally designed to protect their interests. The depth and intensity of their attachments became very apparent when coalitions formed to oppose the Meech Lake accord and the Charlottetown agreement. They feared that major provisions in both packages jeopardized "their" rights.[88] Most new left activists are inspired by broadly defined rights that are not formally recognized. Some insist that our constitution is incomplete without a declaration that protects the natural environment and human health. Others want positive rights that would force governments to establish a welfare state that promotes human dignity and social equality. We know that judicial intervention has helped gays and lesbians. They can base their legal claims and political appeals on the promise of equality in section 15.

Businesses cultivate identities based on a range of values, including efficiency, prudence, and innovation. However, they can succeed without the power that rights can produce. Corporations do not encounter persistent organizational problems.[89] The incentive to pursue collective action is strong because the costs they try to avoid and the benefits they try to secure are usually concentrated and exclusive. Companies facing the same threats and the same opportunities tend to see their common interests. They also derive influence from their role in the economy.[90] Politicians know that businesses generate wealth. They create new technologies, attract foreign investment, support philanthropic endeavors, employ millions of workers, and pay billions of dollars in taxes.

Entering the Courtroom to Enhance Democracy. Aboriginal peoples, Charter Canadians, civil libertarians and new left activists share another characteristic that predisposes them to litigate: they are judicial democrats. These groups believe that litigation has the potential to make our public institutions more accessible, transparent and responsive, if courts hear from a diverse range of interests, guard fundamental social values and protect disadvantaged minorities. We know that some activists agree with the neo-Marxists and critical legal scholars who warned social movements to resist the lure of constitutional litigation. They doubt that lawyers and judges are the real champions of democracy. We also know that Abo-

riginal peoples, Charter Canadians, civil libertarians and new left activists make shrewd strategic calculations to improve their chances of success. However, the normative assertion that is embedded in their legal claims and political appeals is a crucial distinguishing feature. These interests display a greater propensity to litigate because the architects who design campaigns and the allies who work outside the courtroom believe that judicial review can enhance democracy. They are moved by this conviction.

Judicial democrats emphasize a structural defect that all liberal democracies confront. Without courts enforcing constitutional guarantees, governments can make choices that harm minorities, especially if they are vulnerable or unpopular.[91] This threat is serious, they argue, because our representative institutions do not reflect the diversity of Canadian society. For example, a growing number of women sit in Parliament and the provincial legislatures, but men still dominate these chambers; we see few visible minorities and even fewer Aboriginal peoples.[92] This deficiency raises the possibility that policies will not reflect the interests of "weaker voices" that struggle for recognition. Moved by public sentiments, ideological preoccupations or financial pressures, governments might be tempted to impose limits on the rights that minorities assert. This problem exists, we are told, even when politicians do not intend to discriminate.[93] The men who dominate our representative institutions often fail to appreciate the deleterious effects of laws that appear to be fair.

Judicial democrats who believe that courts should protect minorities suggest that majorities are more apparent than real. They identify faults acknowledged by political scientists and disenchanted voters.[94] Elections are blunt instruments for registering preferences. During campaigns, personality is more important than policy and debates lack substance. Parties usually win control of the state by securing the support of pluralities not majorities. After taking office, a new government with only a general mandate can decide to pursue a disruptive legislative agenda that most citizens oppose. Because party discipline is so strong, it is difficult to know how many representatives actually support a proposed policy.

The activists who offer this critical assessment also tell us that democracy is weakened by a persistent bias. Interests trying to shape public policy do not enjoy the same opportunities.[95] Some have access to the cabinet ministers and bureaucrats who exercise real power. Others are excluded or ignored because they question deeply held attitudes and practices that have been accepted for generations. Corporations are privileged because of their role in the economy. Worse, their influence has been bolstered by the pressures of globalization.[96] Groups concerned about public problems are often dismissed when they demand expensive social programs and strict regulations that penalize important industries. The judicial democrats who see this bias do not believe that our institutions are open and transparent.[97] Elite accommodation leaves little room for public deliberation and bureaucrats draft thousands of regulations away from the scrutiny that shapes the legislative process — they write "secret laws."[98]

Aboriginal peoples, Charter Canadians, civil libertarians and new left activists who want courts to enforce fundamental values find cautionary narratives in our past. They tell us that federal officials undermined Aboriginal culture and suspended basic human rights. Adults did not enjoy the privileges of citizenship and children were sent away to residential schools, wrenched from their families and communities. Voters could have objected to these practices in general elections, but they did not. In Manitoba, the Protestant Anglophone majority failed for more than a century to respect rights designed to protect the Catholic Francophone minority. During the

1940s, Japanese Canadians were taken to detention camps. Civil libertarians also remember the 1950s, when religious minorities in Quebec were subjected to a campaign of harassment, orchestrated by the Premier and carried out by the police. In several provinces, mentally disabled women were forced into sterilization programs. During the 1960s, the RCMP investigated thousands of civil servants to root out homosexuals. Feminists were still fighting blatant forms of discrimination in the 1970s, opposing social policies that stopped pregnant women from receiving unemployment benefits, provisions in the Indian Act that stripped Aboriginal women of their status and a family law regime that hurt women by discounting their contributions.

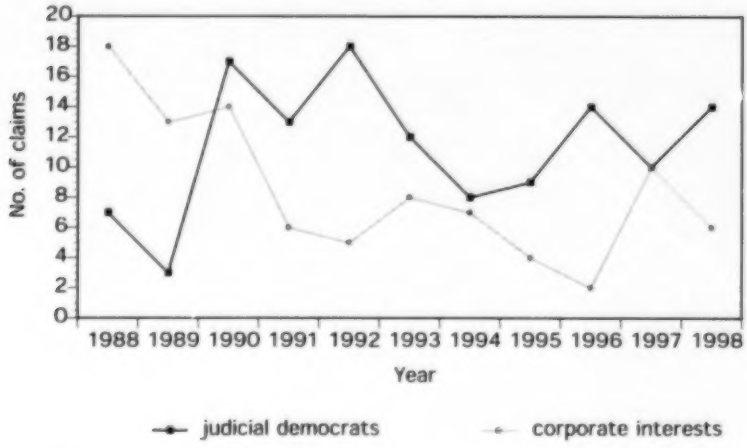
Judicial democrats display a propensity to litigate because they still believe that courts have to counter grave threats. Civil libertarians have to be vigilant because police officers who resent the Charter and politicians who promise law and order are tempted to limit fundamental guarantees.[99] Aboriginal women who want to advance their interests have to litigate to win access to constitutional conferences.[100] Legal action is still an essential strategy for environmental groups because provincial officials eager to promote economic growth sometimes leave pollution laws unenforced.[101] Coalitions of anti-poverty activists feel compelled to litigate when governments pass laws that stigmatize and harass homeless people.[102] Francophones in English Canada and Anglophones in Quebec have to invoke education rights to secure good facilities and autonomous school boards. Governments are willing to draft comprehensive agreements, Aboriginal leaders tell us, because courts continue to enforce Aboriginal rights.

Unlike these judicial democrats, the executives and lobbyists who represent corporations and entire industries do not believe that active courts should try to enhance democracy. In certain contexts, they say the very opposite. When litigation has hampered their ability to generate profits, businesses espouse an argument that is also made by conservative critics. They admire the virtues of majoritarian democracy and lament the loss of legislative supremacy. This defence becomes apparent when governments try to improve access to legal remedies. In Ontario, coalitions organized to stop the Class Proceedings Act during the late 1980s and the Environmental Bill of Rights during the early 1990s. To oppose these threatening measures, businesses questioned the legitimacy of judicial review, criticized the institutional capacity of courts and emphasized the disruptive effects of litigation.[103] What did they fear? Mischievous activists would "flood" the judicial system with "frivolous" claims. Because courts would become partners in the regulatory process, it would become less flexible and more cumbersome. Favourable decisions made by politicians who appreciate the central role that corporations play would be overturned by judges who are shielded from the realities of a competitive global economy.

Changing Circumstances

Interpretive Opportunities. Corporations do not share the stable characteristics that draw judicial democrats into the courtroom. However, this study also reveals an important similarity — corporations and judicial democrats both encounter the changing circumstances that make legal action seem attractive or even essential. For example, these interests enter the courtroom when interpretive uncertainty creates opportunities that are difficult to resist. It can take several years for courts to define the terse declarations that governments write. Rival interests understand the importance of shaping this incremental process. Judges can accept or reject their arguments, expand or diminish their resources and improve or reduce their chances of success. Favourable

Figure 4
Targeting Elected Officials



Source: Court Challenges Database.

decisions also create opportunities. When a single group pulls off an unexpected victory by persuading a court to accept a new interpretation of a statutory provision or a constitutional guarantee, other organizations will be tempted to reap the same rewards. We can see some of the effects in Figure 4. After the Charter was introduced, businesses tested legal arguments based on fundamental freedoms, legal rights and the guarantee of equality in section 15. Encouraged by several early victories, they challenged inquiry powers exercised by public agencies, Criminal Code provisions allowing publication bans, provincial taxes and measures frustrating commercial expression.[104] The pace of participation declined in 1991 because obstacles erected by the Supreme Court blocked off a number of possible strategies.

Judicial democrats also fought interpretive battles during the first decade. Charter Canadians were determined to shape the development of their constitutional rights and new left activists were eager to persuade the Supreme Court to extend the scope of existing provisions. Groups representing disabled people countered rules that restricted voting and environmental groups invoked the promise of life, liberty, and security to prevent toxic substances from damaging human health.[105] Several streams converged to produce the wave evident in Figure 4 between 1989 and 1992. Feminists launched an ambitious campaign in 1982 after leaving the patriation round triumphant. They achieved an important victory in 1989, when the Supreme Court agreed that section 15 mandates "substantive equality." The majority concluded that judges have to consider both the purpose and the impact of a law to stop the "differential treatment" that causes discrimination.[106] This precedent was crucial because it raised the value of constitutional litigation for interests advocating equality. Charter Canadians and new left activists launched a number of challenges to reveal how policies that are ostensibly neutral actually hurt women, gays and lesbians, visible minorities, and poor people. Environmental groups started to litigate in 1970 to enforce a new generation of pollution laws, but their big break came in 1989 when the Federal Court decided that guidelines for environmental assessments created mandatory duties

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Table 4
Hostile Actions

Organized Interests	No. of claims	Percentage of total claims brought by groups in each category
Charter Canadians	27	34
New Left Activists	7	19
Civil Libertarians	6	15
Aboriginal Peoples	10	13
Corporate Interests	25	5

Source: Court Challenges Database.

that constrain the Crown.[107] This single decision encouraged activists across the country to devise similar claims.[108]

Countering Immediate Threats. Judicial democrats and corporations also encounter immediate threats that push them into the courtroom. Table 4 reveals an inescapable strategic problem. Organizations have to target hostile actions to defend public policies, Criminal Code provisions, common law standards, judicial interpretations and administrative orders that favour their interests. It is startling to see that 34 percent of the claims brought by Charter Canadians are intended to counter these threatening claims. Critical legal scholars and neo-Marxists predicted this trend. After the patriation round, they warned social reformers who were dazzled by the possibilities of constitutional litigation that time and money would have to be spent reacting to claims brought by their enemies. Feminists intervene to protect Criminal Code provisions governing sexual assault, hate speech and pornography.[109] Groups representing the disabled support policies that mandate special education.[110] A growing number of issues pull competing organizations into the courtroom: cases that implicate the fetus attract pro-choice activists and pro-life groups;[111] fishing companies and Aboriginal peoples fight over valuable natural resources;[112] some Aboriginal bands oppose Aboriginal women who challenge residency requirements;[113] rival drug manufacturers try to secure and block the notices that allow companies to produce pharmaceuticals;[114] new left activists and businesses defend or attack measures designed to protect the natural environment.[115]

Corporations face another threat that can only be countered through litigation. Governments conduct inspections, initiate civil actions and bring criminal charges to enforce a range of laws. We already know that businesses raise the Constitution as a sword to cut away policies that constrain their activities. Corporate litigants also hold up the Constitution as a shield to block the state from scrutinizing their affairs. Businesses can devise a wide array of legal arguments because the Supreme Court has decided that any Charter guarantee can be invoked as a defence. To advance their interests, businesses attack a wide range of government powers: procedures allowing authorities to conduct searches and seizures; general inquiry powers; and regulatory measures that restrict the right to counsel in the old Combines Investigation Act, the new Competition Act, the Income Tax Act and laws governing the banking industry.[116] This desire to obstruct scrutiny will always be an important source of litigation.

Diminished Political Resources. Organizations also enter the courtroom when contextual changes diminish the level or value of their political resources. Their fortunes can be affected by the rate of economic growth, unemployment, environmental disasters, the appointment of new cabinet ministers and international conflicts. Because influence is not a fixed characteristic, all interests can be placed at a disadvantage — even huge industries that employ thousands of workers and generate billions of dollars in revenue. We know that tobacco companies have been hurt by compelling scientific evidence and adverse public opinion for more than a decade. Governments have introduced a number of measures to restrict the use of their product. Jurisdictions in Canada and the United States have also initiated civil claims to recover health-care costs.[117] This hostility makes litigation an attractive strategy. For example, R.J.R. Macdonald won an impressive victory in a decision that has been denounced by health-care advocates, groups representing victims and new left activists who feel that corporations wield too much power.[118] Invoking the guarantee of free expression, it persuaded the Supreme Court to remove an advertising ban. The other cases are less dramatic. For instance, fishing companies on both coasts have been hit hard because federal officials have taken remedial steps that restrict commercial enterprises to halt the decline of stocks. Businesses unable to secure favourable policies have responded by pressing their claims in court.[119]

Only ideologues believe that corporations are invincible. Still, in a world shaped by the pressures of globalization, businesses that can survive in the international economy enjoy an advantage. Governments determined to eliminate annual deficits and tackle accumulated debts now support policies that favour competitive corporations. They are promoting the benefits of trade liberalization, deregulation, and tax reduction. This shift has undermined other interests. Politicians trying to reduce the size of the state are less willing to agree with activists who demand expensive national programs and onerous regulatory regimes. In this climate, judicial democrats find litigation even more compelling, especially when they encounter indifference and hostility. After failing to win in the legislative arena, Charter Canadians can mount legal challenges to reform the Income Tax Act and expand the scope of social services. When federal officials fail to implement the core recommendations of a royal commission that examines the plight of Aboriginal peoples, First Nations can ask judges to hear their concerns.[120] New left activists ignored by political elites can knock down policies that exclude homosexuals and demand the strict enforcement of environmental laws. Governments that have achieved a budget surplus have more room to consider policy options, but judicial democrats have learned an important lesson during the past decade: litigation is indispensable when the country is toiling through tough times.[121]

Interest Group Litigation and Canadian Democracy

This study tells us what we need to know to contemplate the effects and implications of interest group litigation.

- The central insight is that Aboriginal peoples, Charter Canadians, civil libertarians, and new left activists are drawn into court by the stable characteristics that elevate the propensity to litigate and by the changing circumstances that make legal strategies seem compelling. These are the judicial democrats. They will continue to generate a steady stream of controversial claims because they believe that democracy can be enhanced by judicial review.
- Judicial democrats are not in court alone.

The judicial system is filled with a wide array of groups that express a broad range of values. This diversity is a triumph for citizens who struggled for decades to win new opportunities to participate in our public institutions.

- Some organized interests are reluctant litigants. Professionals, social conservatives and victims mobilize the law sporadically. Although groups that represent workers are more willing to bring legal claims, they usually attack bureaucratic officials, leaving major public policies unscathed.
- Corporations do not display a propensity to litigate, but they do encounter the changing circumstances that push interests into the courtroom. They ask judges to overturn cabinet decisions and laws passed by both levels of government, often to resist state intervention.

The purpose of this study is to understand a controversial form of collective action, but it can also help us assess the current relationship between citizens, legislators, and judges. In the debate over judicial activism, most commentators exaggerate the hazards and underestimate the rewards. Courts interpreting cryptic constitutional declarations and treaties signed centuries ago do make decisions that cause turmoil. They can disrupt legislative agendas, strain regulatory regimes already burdened by arduous responsibilities and force governments to adjust the allocation of resources. Our political life, as a consequence, is probably less tranquil and more uncertain today. However, we now have a judicial system that responds to a diverse range of interests. Judges hear from professionals advancing pecuniary claims, Aboriginal peoples who want their treaty rights respected, and environmentalists who monitor the erosion of important ecosystems. Courts enforcing the Charter help businesses trying to protect commercial expression, homosexuals who want the family law remedies that heterosexuals expect and linguistic minorities struggling to preserve their culture. That so many groups are able to advance their claims through the courts is an accomplishment that Canadians should celebrate.

Critics troubled by active courts want to restore the relative calm we once enjoyed by resurrecting "traditional judicial review."[122] What do they propose? The Supreme Court has to bring back the old standing requirements, discourage interests from intervening, consider only narrow legal questions raised by live controversies and question the value of extrinsic evidence. They resent judges who allow political adversaries to clutter the courtroom, evaluate policy alternatives with misplaced confidence and try to settle future disputes in a single decision. Conservative critics believe that prudence should replace arrogance. It is too easy for judges to advance their personal preferences, they insist, if the "living tree metaphor" can be invoked as a license to alter the meaning and scope of enumerated guarantees. The Supreme Court has to remember the primary purpose of a liberal democratic constitution: to protect individuals by placing limits on the state. Legal remedies should not increase the presence of the state. Judges should never punish governments for failing to act by filling perceived omissions. They should also resist the temptation to expand services, benefits, regulatory regimes and Aboriginal treaties.

This argument can sound appealing, especially when the Supreme Court delivers a decision that divides the country. Still, the measures that conservative critics propose have a distinct bias that Canadians should know about. Resurrecting traditional judicial review would filter out certain interests and values. Returning to the old rules governing standing and intervenor status would hurt public interests unable to demonstrate a direct stake in a dispute. Excluding extrinsic evidence would make it more difficult for litigants

who want to trace the adverse effects of a law. Freezing the meaning and scope of constitutional guarantees would leave judges unable to address new social problems that create discrimination. If courts only placed limits on the state, litigation would be a poor strategy for citizens who want to bolster regulatory regimes or expand social services. Taken together, these obstacles would hinder interests concerned about racism, homophobia, gender inequality, environmental degradation, poverty, the lives of the disabled and the plight of Aboriginal peoples. Traditional judicial review would not, however, frustrate litigants advancing conventional pecuniary claims and legal action would still be an effective strategy for interests that want to resist state intervention.

Although constrained courts would cause fewer disruptions, we would pay a price. Litigation would help corporations but not groups trying to address public problems. Critics of judicial activism stumble here. They want to stop social reformers from seeking the legal remedies that businesses have always requested. Seen from this perspective, the current relationship between citizens, legislators, and judges is attractive because it meets a basic requirement of democracy that many Canadians embrace. Nations composed of diverse interests should not have institutions that respond to some and ignore others.

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Notes

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116 *Stelco v. Canada* [1988] 1 F.C. 510; [1990] 1 S.C.R. 617; *F.K. Clayton Group v. Canada* [1988] 2 F.C. 467; *YRI York v. Canada* [1988] 2 F.C. 504; *Thomon Newspapers v. Canada* [1990] 1 S.C.R. 425; *McKinlay Transport v. Canada* [1990] 1 S.C.R. 627; *Solvent Petroleum Extraction v. Canada* [1990] 1 F.C. 20; *R. v. Wholesale Travel Group* [1991] 3 S.C.R. 154; *Kourtessis v. Canada* [1993] 2 S.C.R. 53; *Groupe Tremblay Syndics v. Canada* [1997] 2 F.C. 719.

117 John Ibbitson and Richard Mackie, "Power to Sue Big Tobacco Tucked into Health Bill," *Globe and Mail*, December 3, 1999, p. A8.

118 *R.J.R. Macdonald v. Canada* [1995] 3 S.C.R. 199.

119 *Comeau's Sea Foods v. Canada* [1992] 3 F.C. 54; *Antonsen v. Canada* [1995] 2 F.C. 272; *Carpenter Fishing Corporation v. Canada* [1998] 2 F.C. 548.

120 Most of the recommendations of the Royal Commission on Aboriginal peoples, delivered in 1996, have been ignored by the federal government.

121 Other studies demonstrate the importance of litigation when political resources wane. See Sylvia Bashevkin, *Women on the Defensive: Living Through Conservative Times* (Toronto: University of Toronto Press, 1998).

122 Rainer Knopff and F.L. Morton, "Canada's Court Party," in Anthony Peacock (ed.), *Rethinking the Constitution* (Toronto: Oxford University Press, 1996), pp. 73-80.

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Résumé

Interest Group Litigation and Canadian Democracy

Gregory Hein

Un nouveau mode d'action, objet de controverses, est en voie de transformer la scène politique canadienne : des groupes de pression, déterminés à faire évoluer l'opinion publique et les politiques gouvernementales, choisissent de porter leurs causes devant les tribunaux. Ils participent ainsi à la plupart des procès qui invitent à l'activisme judiciaire. Cette stratégie déconcerte bien des gens et suscite bien des critiques : gauche, on craint que la contestation judiciaire ne désamorce la lutte menée au nom du progrès social et à droite, on y voit une façon de court-circuiter les corps élus et une menace à la vie démocratique du pays.

Dans le présent essai, j'analyse les revendications soumises à la Cour fédérale et à la Cour suprême du Canada entre 1988 et 1998. Ma démonstration vient appuyer une thèse que j'ai élaborée sur les raisons qui conduisent les organismes à emprunter la voie judiciaire pour atteindre des objectifs politiques. La propension à contester devant les tribunaux croît en fonction d'une série de caractéristiques stables. Ainsi, les groupes d'intérêt sont plus enclins à faire appel à la cour lorsqu'ils disposent des ressources nécessaires, d'une identité collective fondée sur des droits et d'une vision normative qui les incite à cette forme d'activisme. Mais leurs choix stratégiques sont également fonction de circonstances changeantes, qui peuvent les amener à juger opportun ou même essentiel le recours aux tribunaux. Ces organismes jouent ainsi sur diverses interprétations possibles d'un problème, écartent les menaces immédiates sur lesquelles la cour a pouvoir de statuer et, une fois épuisés les recours politiques, transportent le combat vers l'arène judiciaire.

L'étude révèle que notre système judiciaire est le champ d'action d'une multitude de groupes de pression, qui expriment un large éventail de valeurs. C'est ainsi que des entreprises exercent des pressions d'une étonnante vigueur, pour convaincre les juges de renverser telle loi du Parlement ou telle décision du cabinet. Pourtant peu enclines à la contestation judiciaire, elles y sont poussées par les circonstances changeantes qui font apparaître celle-ci comme un outil stratégique incontournable. Par exemple, des gens d'affaires qui ont épuisé leurs recours politiques font appel au tribunal pour contrer les manœuvres hostiles d'un concurrent ou pour faire obstacle à l'enquête qu'un organisme gouvernemental mène à leur sujet.

De tous les groupes, les plus susceptibles d'influencer par leur action judiciaire les politiques publiques sont les peuples autochtones, les défenseurs de la Charte des droits, les tenants des libertés civiles et les nouveaux activistes de gauche. Car ces groupes de pression sont mus non seulement par les facteurs permanents (ou caractéristiques stables) qui incitent à la contestation, mais aussi par les facteurs conjoncturels (ou circonstances changeantes) qui les poussent vers les tribunaux. Je les appelle « démocrates justiciers », par allusion au caractère provocateur de leur démarche judiciaire et de leur contestation politique : ils voient dans le recours aux tribunaux un moyen de rehausser la qualité de la vie démocratique. En pointant du doigt les failles de notre système de gouvernement, ils rappellent à la magistrature son devoir de protéger les minorités vulnérables, de sauvegarder les valeurs fondamentales de la société et de se mettre à l'écoute des groupes démunis de pouvoir.

L'étude qu'on va lire peut aider les Canadiens et les Canadiennes à évaluer les relations qui unissent les citoyens, les législateurs et les magistrats. Trop souvent, dans le débat que suscite l'activisme judiciaire, les commentateurs exagèrent les dangers de cette pratique et en sous-estiment les avantages. Certes, les décisions de la cour peuvent avoir des effets perturbateurs : elles peuvent bousculer l'ordre du jour des législateurs, alourdir encore les responsabilités de la fonction publique, modifier les priorités budgétaires alors que les gouvernements cherchent à éliminer leurs déficits, semer la division au sein de la collectivité. Les vives controverses qu'elles soulèvent impriment à notre vie politique une allure moins tranquille et moins assurée qu'autrefois. Grâce à cela, toutefois, notre système judiciaire est devenu plus ouvert à un large éventail d'intérêts : ceux des entreprises, ceux des groupes environnementaux, ceux de minorités traditionnellement laissées pour compte, comme les homosexuels et les peuples autochtones. Une telle réussite mérite un coup de chapeau.

Summary

Interest Group Litigation and Canadian Democracy

Gregory Hein

A controversial strategy is changing Canadian politics. Interest groups determined to shape public attitudes and public policy are choosing to litigate. Organizations participate in most of the dramatic cases that invite judicial activism. Some find this trend disconcerting: we find critics on the left who fear that litigation will undermine the struggle for a better society and critics on the right who insist that democracy is threatened by groups that use litigation to circumvent our representative institutions.

This study looks at claims brought to the Federal Court and the Supreme Court between 1988 and 1998. The evidence supports an argument that I have developed to understand why organizations pursue legal action to achieve political goals. The propensity to litigate is elevated by a cluster of *stable characteristics*. Interests are more inclined to mobilize the law when they have impressive legal resources, collective identities based on rights, and normative visions that demand judicial activism. Strategic choices are also affected by *changing circumstances* that make litigation seem attractive or even essential. Organizations take advantage of interpretive opportunities, counter immediate threats that can be addressed by judges, and move policy battles into the courtroom when their political resources wane.

This study reveals that our judicial system is filled with interests that express a wide array of values. Corporations exert a surprising degree of pressure by asking judges to overturn laws and cabinet decisions. Though not inclined to litigate, they are pushed into court by the changing circumstances that make litigation a compelling strategic maneuver. Businesses counter hostile claims brought by their adversaries, block government agencies investigating their affairs, and go to court when their political resources have been depleted.

Aboriginal peoples, Charter Canadians, civil libertarians, and new left activists have the greatest potential to influence public policy through legal action because they are affected by both the stable characteristics that elevate the propensity to litigate and the changing circumstances that push organizations into the courtroom. I call these interests "judicial democrats" because a provocative idea runs through their legal claims and political appeals — judicial review has the potential to enhance democracy. Finding deficiencies that impair our system of government, they believe that judges should protect vulnerable minorities, guard fundamental values and listen to groups that lack power.

This study can help Canadians evaluate the relationship between citizens, legislators, and judges. In the current debate over judicial activism, too many commentators exaggerate the hazards and underestimate the rewards. Courts can be disruptive. They can rearrange legislative agendas, strain bureaucracies already taxed by arduous responsibilities, alter spending priorities when governments are striving to eliminate deficits, and divide communities. Because courts can spark heated controversies, our political life does seem to be less tranquil and more uncertain today. However, we now have a judicial system that responds to a diverse range of interests, from corporations to environmental groups to traditionally disadvantaged minorities such as homosexuals and Aboriginal peoples. This is an accomplishment that should be celebrated.